

No. 87-1167

Supreme Court

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PRICE WATERHOUSE,
Petitioner

v.

ANN B. HOPKINS,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR RESPONDENT
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that petitioner's rejection of respondent's candidacy for partnership was caused, in part, by discrimination based on sex.

2. Whether, given this finding, the courts below properly placed on petitioner the burden of proving that the same result would have been reached absent discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 825 F.2d 458. The opinion of the district court (Pet. App. 40a-62a) is reported at 618 F.Supp. 1109.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1987 (Pet. App. 63a), and a petition for rehearing was denied on September 30, 1987 (Pet. App. 65a). On December 11, 1987 the Chief Justice extended

the time for filing the petition for a writ of certiorari to January 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case examined the elaborate and unique admissions process of petitioner Price Waterhouse, a large nationwide firm that in 1983 rejected respondent Ann Hopkins' candidacy for partnership. The partnership admissions process occurs annually, stretching over a nine month period, and involves consideration of scores of candidates. Each admissions cycle includes, among other things, discussion and nomination of candidates by partners in a local office, "long form" or "short form" written comments by partners from other offices (depending on how well they knew particular candidates), office visits and discussion by an Admissions Committee, and more discussion and final action by the Policy Board, Price Waterhouse's governing body. Pet. App. 5a, 41a-42a. The admissions process is collegial in the broadest sense, with actors able to exert influence at myriad points along the path and—as the district court found—with special weight accorded negative views. Pet. App. 50a.

Ann Hopkins received a glowing nomination from her local office, Pet. App. 4a, and was one of 88 senior managers at Price Waterhouse considered for partnership in the 1982-83 admissions cycle. The other 87 candidates were men. At the time, Price Waterhouse had 662 partners nationally, of whom 7 were women. Hopkins had secured some \$40 million in new business for the firm, more than any other candidate. She also had more billable hours than any of the men, and her clients were "very pleased" with her work. Pet. App. 43a.

In early 1983 Hopkins was notified that she had not been selected as a partner. At that point, she discussed her chances for future selection with the partner-in-charge of her office, who the district court found was "re-

sponsible for telling her what problems the Policy Board had identified with her candidacy." Pet. App. 52a. He advised her to

walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.

Id. Later, after again being passed over for partnership, Hopkins began the administrative process that culminated in this litigation.

The district court treated this case as one of mixed lawful-unlawful motivation, noting that some partners raised nondiscriminatory concerns about respondent. But the court also expressly found that discrimination based on sex infected Price Waterhouse's consideration of Hopkins' candidacy, Pet. App. 58a-59a, and that "denial of partnership in her specific situation was caused, in part," by this discrimination. Pet. App. 62a. These findings were grounded on an intensive examination of the partnership admissions process—including but not limited to candidate evaluations tendered by individual partners—and on the testimony of a social psychologist whom the court described as a "well qualified expert." Pet. App. 53a.

Having found that unlawful as well as lawful factors played a role in Hopkins' rejection, the district court then followed settled precedent and inquired whether Price Waterhouse had proved that Hopkins would have been rejected even in a bias-free setting. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). The court found that Price Waterhouse had not carried its burden, and a Title VII violation was established. Pet. App. 59a-60a.

The court of appeals affirmed the trial court's finding that Price Waterhouse had violated Title VII in excluding Hopkins from partnership. Describing the firm's

argument—similar to the one made in this Court—as “nothing more than a thinly disguised quarrel with the District Court over appropriate inferences to be drawn from the evidence before it,” Pet. App. 11a, the court of appeals found “ample support” for the trial court’s finding that discrimination had “infected” the partnership selection process to Hopkins’ detriment. Pet. App. 17a. This evidence consisted of the comments made about her, including the especially telling advice from her partner-in-charge to walk, talk and dress “more femininely”; expert testimony that sexual stereotyping played a major role in Price Waterhouse’s consideration of Hopkins; and negative comments made about previous female candidates. Pet. App. 12a-17a. The court of appeals also held that, given the evidence of mixed motivation, the trial court correctly shifted the burden to Price Waterhouse “to show that the decision would have been the same absent discrimination.” Pet. App. 23a. Since petitioner could not make this showing, the court of appeals ruled that the district court properly found Price Waterhouse liable under Title VII. Pet. App. 25a.¹

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct, is consistent with the decisions of this Court, and does not present a conflict with any decision of any other court of appeals that warrants this Court’s review or that would make a difference in the outcome here.

1. *Introduction.* This case does not warrant review by this Court. Decisions on partnership are covered by

¹ Hopkins had left Price Waterhouse after being passed over for partnership the second time, and the district court declined to award relief on the grounds that she had not proved constructive discharge and had failed to present adequate proof on damages. Pet. App. 59a-62a. The court of appeals reversed this aspect of the trial court’s decision and remanded for entry of “full relief.” Pet. App. 25a-28a. Price Waterhouse does not here challenge this ruling.

Title VII, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and the courts below followed settled legal principles in determining that Price Waterhouse denied partnership status to Ann Hopkins in violation of the Act.

Price Waterhouse employs various arguments in seeking to have this Court review this liability determination. Foremost, petitioner asserts that there was no evidence that discrimination played *any* role in the decision to reject Hopkins. The problem here, of course, is that the district court found otherwise, and that finding is not clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). The court of appeals considered and rejected this factual argument, and no justification exists for further review by this Court. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

Price Waterhouse also tries to suggest that it was error, in a mixed motivation case where unlawful motivation had been established, to shift the burden to the employer to prove that the same decision would have been made absent discrimination. Yet this Court’s precedents require just this approach, *Mt. Healthy*, 429 U.S. at 287, and the courts of appeals have routinely adhered to it in Title VII cases presenting questions of mixed motivation.

Ultimately petitioner is reduced to arguing that, assuming the courts below were right—as they were—in placing the burden on Price Waterhouse to prove that Hopkins would have been rejected even in a neutral setting, the proper evidentiary standard is preponderant rather than clear and convincing evidence. Petitioner did not press this point below, however, and for good reason: its resolution would make no difference in this case. Price Waterhouse did not begin to prove—under any standard—that Ann Hopkins would have been denied partnership in the absence of discrimination. Moreover, even apart from this suit, there is little if any ma-

terial distinction between the preponderant and clear and convincing standards as applied in Title VII cases, so there is no conflict warranting review by this Court. In any event, the clear and convincing standard is employed by the Equal Employment Opportunity Commission in similar cases, and its use here was proper. 29 C.F.R. 1613.271.

2. *The Clearly Erroneous Standard and the Facts.* Although ostensibly seeking review of legal issues, Price Waterhouse repeatedly argues the facts, suggesting that this was not truly a case of mixed motivation because there was no evidence that discrimination played *any* role in its rejection of respondent's candidacy. The district court, however, found otherwise. The trial court's opinion details the evidence supporting its finding of discrimination, but two points are especially instructive. The first is the advice Hopkins got from her boss, the partner-in-charge of her office, who counseled her to "walk more femininely, talk more femininely, dress more femininely," etc. Pet. App. 52a. This advice had nothing to do with Hopkins' professional bearing or appearance—she was always well turned out—but it had everything to do with her sex. Second, the partners themselves knew what was going on; as the district court found, Hopkins' "[s]upporters indicated that her critics judged her harshly due to her sex." Pet. App. 51a.

As can be seen, the district court's finding of discrimination is amply supported, and it is shielded by Rule 52. *Anderson v. City of Bessemer*, 470 U.S. at 573-74. This is especially true here, where the trial court was required to undertake detailed scrutiny of a complex and multifaceted partnership admissions process.

In its petition, Price Waterhouse concentrates on trying to discredit the testimony—indeed the field of expertise—of Hopkins' expert. But the criticisms are the same ones made in the court of appeals, which properly

disposed of them. The court observed that the expert was operating within the standards of her discipline in concluding that sexual stereotyping played a "major determining role" in petitioner's decision to reject respondent's candidacy, and it noted that other evidence—including the "extremely small number" of female partners at Price Waterhouse and the "positive assessments of Hopkins in areas where performance could be measured objectively"—supported that conclusion. Pet. App. 14a-15a.²

More important, the expert testimony was not the only evidence of discrimination relied on by the district court. Conspicuously absent from the petition is any reference to the advice that Hopkins' boss gave her to behave "more femininely." This is direct evidence of discrimination, which the dissent below referred to as a "smoking gun." Pet. App. 31a. Indeed, it is remarkable that such proof could be adduced in a case involving sophisticated professionals. The dissent recognized that this evidence had to be addressed, although it did so only by incorrectly arguing that the district court was clearly erroneous in attaching significance to it. *Id.* Petitioner may be reluctant to make such an unvarnished assertion of clear error in this Court, so it simply ignores the "smoking gun" altogether. But it remains, and it is central to this case.

The district court concluded that Price Waterhouse did nothing to address the "conspicuous problem" of sexual stereotyping in its admissions process and that, instead, the process gave "substantial weight" to comments influenced by such stereotypes. These factors "combined to

² Although petitioner here casts aspersions on the expert's competence and her field, the court of appeals observed that Price Waterhouse "failed to challenge the validity of [the expert's] discipline at trial and disavows any such challenge here." Pet. App. 15a. Moreover, at trial Price Waterhouse volunteered that it had "no objection to the expertise of this witness." 3/28/85 Tr. 540.

produce discrimination in the case of this plaintiff." Pet. App. 58a.

In assessing these findings, the record must be "viewed in its entirety." *Anderson v. City of Bessemer*, 470 U.S. at 574. From this perspective, it is plain that the district court was not clearly erroneous in finding that discrimination played a role in Price Waterhouse's rejection of Ann Hopkins' candidacy for partnership. The court of appeals carefully considered the record, and no purpose would be served by having this Court again review these factual findings. *Rogers v. Lodge*, 458 U.S. at 623.

3. *The Law.* Given its findings of fact, the legal analysis employed by the district court was unexceptional. Even Judge Williams, dissenting in the court of appeals, argued the facts, not the law. Thus he had "no quarrel" with the principle that a "party acting with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." Pet. App. 38a, citing *Mt. Healthy*, 429 U.S. at 287, and *NLRB v. Transportation Management Corp.*, 462 U.S. at 403. There could not be any quarrel with this basic principle, for this Court has adhered to it in many contexts involving mixed motivation. *E.g.*, *Mt. Healthy* (activity implicating the First Amendment); *NLRB v. Transportation Management Corp.* (unfair labor practice); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977) (local zoning decision allegedly motivated in part by race).

Indeed, contrary to Price Waterhouse's suggestion, this Court has made it clear that this principle applies to Title VII. *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) ("[e]ven assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not

been injured because they were not qualified and would not have been hired in any event," citing *Mt. Healthy and International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)). The Court has also made clear that *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)—upon which petitioner mistakenly relies—is "inapposite" to cases of mixed motivation, because in *Burdine* "[t]he Court discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB v. Transportation Management Corp.*, 462 U.S. at 400 n.5.

In short, this Court has provided clear guidance on the basic analytical approach to be used in cases of mixed motivation, and the circuit courts have routinely employed it where appropriate under Title VII. *Fields v. Clark University*, 817 F.2d 931, 936 (1st Cir. 1987); *Patterson v. Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1984); *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 618 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984);³ *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d 470, 474 (5th Cir. 1979); *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 115 (6th Cir. 1987); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985); *Caviale v. Wisconsin Department of Health and Social Services*, 744 F.2d 1289, 1296 (7th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (*en banc*); *Nanty v. Burrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *Harbison v. Goldschmidt*, 693 F.2d 115, 117 (10th Cir. 1982); *Bell v.*

³ Petitioner erroneously claims that it is unclear whether the Fourth Circuit has adopted this Court's approach to mixed motivation and seeks to disparage *Patterson v. Greenwood School Dist. 50*—which embraced this approach—by asserting that the Fourth Circuit has never since relied on *Patterson*. Pet. 14 n.6. This is not so. The Fourth Circuit expressly and prominently relied on *Patterson* in *Smallwood v. United Airlines, Inc.*, 728 F.2d at 618.

Birmingham Linen Service, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

There is no division in the circuits warranting review by this Court on the question of the proper approach to be taken in mixed motivation cases under Title VII. *Mt. Healthy* is the polestar. Price Waterhouse's attempt to suggest a division is misguided.⁴

Ultimately petitioner retreats and recognizes that the legal approach taken below was consistent with this Court's decisions. Pet. 20 n.10. Price Waterhouse then quibbles whether this approach should be followed in Title VII cases, but as noted above this Court has already applied the *Mt. Healthy* analysis to Title VII. *East*

⁴ Thus petitioner relies in part on decisions that are "inapposite" because they were traditional *Burdine* cases that did not involve findings of mixed motivation, e.g., *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984); *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Petitioner also asserts that there is a split in the circuits over whether "but for" causation is required under Title VII and implies that the *Mt. Healthy* line of authority employs some other standard of causation. This ignores the fact that *Mt. Healthy* itself provides a vehicle for determining whether an unlawful motive was a "but for" cause of a challenged decision, as the Third Circuit recognized in a case relied on by petitioner, *Lewis v. University of Pittsburgh*, 725 F.2d at 916 (*Mt. Healthy* "did not deviate from the requirement of 'but for' causation; rather, its only effect was to allocate and specify burdens of proof"). This is correct and—as shown in the text—the circuits have followed the allocation of burdens specified in *Mt. Healthy*. Moreover, whether the burdens are said to be allocated in assessing liability or remedy makes no difference in result. Any differences on the basic *Mt. Healthy* approach reside within the circuits, not between them. Compare *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d at 474, with *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984); and *Caviale v. Wisconsin Department of Health and Social Services*, 744 F.2d at 1296, with *McQuillen v. Wisconsin Education Ass'n Council*, 830 F.2d 659 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (Dec. 11, 1987) (No. 87-999).

Texas Motor Freight System v. Rodriguez, 431 U.S. at 403 n.9. Finally, petitioner says that, assuming it was proper for the courts below to place the burden on Price Waterhouse to prove that Ann Hopkins would have been rejected for partnership even in a nondiscriminatory setting, the proper standard is preponderant rather than clear and convincing evidence.

It is of course true that not all courts use the clear and convincing formulation to describe the employer's burden once discrimination has been established. E.g., *Bibbs v. Block*, 778 F.2d at 1325 (preponderant evidence). But this is an archetypal distinction without a difference; its resolution is unlikely to affect any case and certainly would not affect the result here. For this reason, Price Waterhouse failed to press this point below, and that alone is sufficient reason to deny the writ. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).⁵

In the court of appeals, Hopkins asserted that "Price Waterhouse could not make the requisite showing under either [the preponderant or clear and convincing] standard and has not suggested otherwise."⁶ Petitioner never disputed this. Even in this Court Price Waterhouse does not contend that it proved, by a preponderance of the evidence, that Ann Hopkins would have been rejected in a nondiscriminatory setting. It did not even begin to make this showing. The partnership admissions process was broadly collegial; it gave special weight to negative views; there were any number of points along the way where influence could be exerted; and views were not always documented. As applied to Hopkins, this process

⁵ The only reference to this point below came very late in a short footnote (n.5) in Price Waterhouse's petition for rehearing in the court of appeals.

⁶ Reply Brief for Appellant-Cross Appellee at 27 n.11.

was infected by discrimination, as the courts below found. Given the specialized and complex nature of the admissions process as well as the absence of any effort by Price Waterhouse to purge this infection, petitioner did not show that an individual of Hopkins' outstanding objective credentials—*e.g.*, first among the candidates in business produced and hours billed—would still have been rejected even if the process had been untainted by discrimination. This failure of proof is as evident under a preponderant standard as under a clear and convincing test.

Since the same result would be reached here under either standard, this case is a poor vehicle for addressing any conflict. As a practical matter, moreover, the ostensible conflict presents at most a narrow difference in approach, and there appear to be no cases in which the outcome would have been different had a preponderant rather than a clear and convincing standard been applied. Hence addressing this issue here would at best serve limited theoretical purposes; no meaningful conflict would be resolved, and the decision would not affect the result in this case.

Finally, the Equal Employment Opportunity Commission requires use of clear and convincing evidence in the area of Federal employment, where the Commission has direct regulatory authority. 29 C.F.R. 1613.271.⁷ Congress intended that cases of discrimination in the Federal government and the private sector be accorded the same treatment, *e.g.*, *Chandler v. Roudebush*, 425 U.S. 840 (1976), so it was proper for the courts below to employ the evidentiary standard sanctioned by EEOC.⁸

⁷ In *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976), the Court noted the distinction between regulations and guidelines of EEOC and held that less weight would be accorded guidelines. The provision cited in the text, in contrast, is a binding regulation.

⁸ This also disposes of two of petitioner's other contentions. The first is that guidance by this Court is needed for Federal employ-

If the propriety of using the preponderant or the clear and convincing standard in the mixed motivation setting is ever to be addressed, this should occur in a case in which the facts precisely paint the distinction, if any, between the two formulations, *i.e.*, where a difference in approach means a different in result. That is not true here. On the contrary, the size and complexity of Price Waterhouse's partnership admissions process make this case an especially poor canvas for examining this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

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ment. Pet. 17 n.8. But, as is shown, the Federal sector is already governed by clear EEOC regulations. The second contention is that 42 U.S.C. 2000e-2(a)(1) requires a different approach to cases of mixed motivation under Title VII than has been taken in other contexts. Pet. 19-20. Obviously the EEOC, the agency entrusted with administering the statute, does not share this view. In this regard, see also the discussion of *East Texas Motor Freight System v. Rodriguez* at 8-9, *supra*.